United States Court of Appeals

for the Second Circuit

APPENDIX

75-4140

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

LEYDA A. FILPO GENAO DE PEREZ,

Petitioner,

- v -

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Docket No. 75 - 4140

APPENDIX TO PETITIONER'S BRIEF

ANTONIO C. MARTINEZ
Attorney for Petitioner
324 West 14th Street
New York, N.Y. 10014
(212) 989-0404

JANUARY, 1975

PAGINATION AS IN ORIGINAL COPY

LIST OF PARTS OF RECORD HEREIN CONTAINED

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- X

LEYDA A. FILPO GENAO DE PEREZ,

Petitioner,

- v - Docket No. 75-4140

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

- X

APPENDIX TO PETITIONER'S BRIEF

Document #14

ORDER TO SHOW CAUSE and NOTICE OF HEARING * * *

1. You are not a citizen or national of the United States;

2. You are a native of Dominican Republic and a citizen of Dominican Republic;

3. You entered the United States at New York, N.Y. on or about January 5, 1968;

4. You were then admitted for permanent residence on presentation of an immigrant visa issued to you on December 20, 1967 by the American Consul, Santo Domingo, Dominican Republic;

5. You claimed exemption from the required labor certification as the unmarried minor child of a lawful permanent resident of the United States;

6. You were married to Rigoberto Perez on January 2, 1968 at Santiago, Dominican Republic;

7. At the time of your admission to the United States you were not in possession of a valid labor certification as required under the provisions of Section 212(a)(14) of the Immigration and Nationality Act and you were not exempt from that requirement.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provisions(s) of law:

Section 241(a)(1) of the Immigration and Nationality Act, in that, at time of entry you were within one or more classes of aliens excludable by the law existing at the time of such entry, to wit, aliens who are seeking to enter for the purpose of performing skilled or unskilled labor and in whose cases the Secretary of Labor has not made the certification as provided by Section 212(a)(14) of the Act, as amended.* * *

TRANSCRIPT OF HEARING BEFORE THE IMMIGRATION JUDGE, DATED OCTOBER 16, 1973 - LINE 13, PAGE 4 TO AND INCLUDING LINE 2, PAGE 6. Document #11

COUNSEL TO RESPONDENT:

Q. Describe briefly how you came to the United States if you know in your own words?

IMMIGRATION JUDGE: Do you mean by what means of transportation?

COUNSEL: No, the circumstances that led up to her being admitted with an Immigrant visa?

A. My brother petitioned for me.

COUNSEL TO RESPONDENT:

Q. Did your father indicate to you that if you got married before you came to the United States that you might not be admitted to the United States as a minor?

A. No.

Q. What was the first time that you recall that because you had entered the United States as a married minor you could be subject to deportation?

When did you forst get that actual knowledge of the law as it existed?

A. I only found out now after two years after I married my husband because they did not want to give him a visa. But in my country I did not know anything about that.

Q. But briefly give me approximately what date did you say that you learned of this?

A. Well, only now when you direct me to Martinez and he then told me.

Q. Do you mean Mr. Gellman who is associated with Mr. Martinez?

A. Yes.

Q. If I understand you correctly no one at the Consulate informed you of the fact that you could not marry before prior to entry into the United States?

TRIAL ATTORNEY: I object to the form of the question.

COUNSEL: All right.

Q. When you went, briefly describe in your own words what happened the day that you went to the Consulate, Did someone give you a warning as to the fact that you could not marry prior to entry into the United States?

A. No.

Q. When you were at the Consulate when you went for your immigrant visa were there any signs that you could not marry or anything to indicate to you that if you marr[illegible] prior to entry that it would make you inadmissible to the United States?

A. No.

Q.Did you sign any form in the Consulate that would indicate that you could not marry prior to entry?

A. No. And if I signed something that I didn't know what I was signing because I didn't know English. * * *

DECISION OF IMMIGRATION JUDGE, DATED NOVEMBER 7,1973. Document #10

The respondent is a 24 year old female alien, a native and citizen of the Dominican Republic who entered the United States at the port of New York on or about January 5, 1968 at which time she was admitted for permanent residence upon presentation of an immigrant visa issued to her by the American Consul at Santo Domingo, Dominican Republic on December 20, 1967. Subsequent to the issuance of this visa, the respondent was married in the Dominican Republic on January 2, 1968 to Rigoberto Perez.

The Service alleges that the respondent claimed exemption from the requirement of a labor certification as the unmarried minor child of a lawful permanent resident of the United States, and by reason of her marriage she was subject to exclusion at the time of her entry and is now deportable as an alien who was seeking to enter this country to perform

skilled or unskilled labor, but did not have a certification from the Secretary of Labor as required by Section 212(a)(14) of the Immigration and Nationality Act, as amended.

The respondent, through counsel, contests deportability urging that she did not claim exemption from the required labor certification and was unaware of the effect of her marriage upon her admissibility. Under the circumstances of the case, he urges that the instant proceedings be terminated.

The respondent has testified substantially as follows: She went to the United States Consulate in the Dominican Republic with her brother to apply for the visa. There were no notices of any kind, nor was she advised personally, at the consulate of the effect of marriage after the issuance of the visa. Upon her arrival in the United States she was not notified by the Immigration Officer who examined her that she could not enter the United States as a married person. She does not know what a labor certification is and did not learn until about two years after her arrival in the United States when she tried to bring her husband to this country that her entry in the United States was

subject to challenge because of her marriage. Had she known that her marriage would affect her admissibility to the United States she would not have entered into the marriage prior to her departure from the Dominican Republic, she has been working and attending school at night. Since her arrival in the United States.

Aliens seeking to enter the United States to perform skilled or unskilled labor are required to have a labor certification. However exemption from this requirement is granted to special immigrants defined in Section 101 (a)(27)(a) of the Immigration and Nationality Act who are parents, spouses or children of a United States citizen or alien lawfully admitted for permanent residence.

In her visa application the respondent alleged that she was single (Item 10). According to her testimony, her father petitioned to bring her to the United States. Item 34 of the visa application which relates to the claimed exemption from ineligibility to receive a visa, contains a stamped endorsement with the legend. "Section 212(a)(14) of the Immigration and Nationality Act because my husband, wife, son, daughter, father and mother is a United States citizen resident alien". The face of the immigrant

visa also states "Section 212(a)(14) - not statutorily required". From the foregoing, it may be fairly construed that the visa was issued to the respondent without a labor certification as the child of a lawful permanent resident of the United States.

Under Section 101(b) of the Immigration and Nationality Act, the term "child" is defined as: "Unmarried persons under 21 years of age". Respondent's marriage subsequent to the issuance of the visa nullified her exemption from the necessity of a labor certification as a child and rendered her inadmissible to the United States upon her arrival in this country.

An issue has been raised that the respondent was not advised by the Consular Officer of the consequences of marriage upon the validity of her visa.

Under 22 CFR 42.122 of the State Department regulations, a Consular Officer is required, <u>when appropriate</u>, to warn an alien to whom an immigrant visa is issued as a child, that (s) he will be inadmissible as such an immigrant, if (s) he is not unmarried at the time of application for admission at a port of entry. (Underscoring supplied). Moreover, under 22 CFR 42.117(b), it is required that a

visa applicant read the application for an immigrant visa when it is completed, or that it shall be read to him in his own language, or that he shall be otherwise informed as to the completed contents of the application.

In view of the presumption of regularity in connection with the issuance of respondent's visa, it may be referred that she was apprised of the contents of the visa application, and that appropriate advice was given to her, or that the Consular Official did not consider it necessary under the circumstances to so advise her. Respondent's testimony is not sufficient to rebut this presumption.

See Matter of G- ,9I & N Dec. 571 (BIA 1962); Matter of H- ,9I & N Dec. 506 (BIA 1961); U.S.exrel CIANNAMEA v. Neely, 202 F 2d 289 (7CIR, 1953); NIETO v. MCGRATH. 108 F. Supp 150, 154 (S.D. Tex, 1951).

Nor did the alleged failure of the Immigrant Officer who examined the respondent upon her arrival to the United States to inquire about her marriage affect her deportability. Ordinarily a governmental body may not be estopped by the unauthorized acts or omission or neglect

of its officers and agents (31C.J.S. Section 142, pages 706, 707). The respondent was not misled by any affirmative action on the part of the Consular or immigration authority. It was not until she filed a petition to bring her husband into the United States that the Immigration Service became aware of her marriage and thereupon instituted the instant proceedings against her.

Upon the consideration of the entire record in the case it is concluded that the respondent is subject to deportation as charged in the Order To Show Cause.

Respondent has applied for the privilege of voluntary departure. According to her testimony her mother and siblings are lawful permanent resident of the United States. She stated that she has the necessary funds and would depart within the time fixed if required to leave the United States. No evidence of any criminal record has been developed against her. Accordingly, she is found eligible for the privilege of voluntary departure and that privilege is being extended to her. In view of her family ties in this country she will be given two months from the date of this decision to effect departure and

upon her failure to do so she should be deported. She has designated the Dominican Republic as the country to which she prefers to be deported, and deportation therefore will be directed to that country.

ORDER: IT IS ORDERED that in lieu of an Order of deportation the respondent be granted voluntary departure without expense to the government within two months from the date of this decision or any extension beyond such date that may be granted by the District Director and under such conditions as the District Director shall direct.

IT IS FURTHER ORDERED that if respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following Order shall thereupon become immediately effective: The respondent shall be deported from the United States to the Dominican Republic on the charge contained in the Order To Show Cause.* * *

ORDER OF THE BOARD OF IMMIGRATION APPEALS DATED MAY 27, 1975. Document #8

CHARGES:

Order: Section 241(a)(1), I&N Act (8 U.S.C.1251 (a)(1) - Excludable at entry - no valid labor certification

APPLICATION: Termination of proceedings; in the alternative, voluntary departure

This is an appeal from an order of deportation entered by the immigration judge on November 7, 1973, which granted the respondent the privilege of voluntary departure. The respondent contends that the proceedings should be terminated. The appeal will dismissed.

The record relates to a married female alien, 24 years of age, a native and citizen of the Dominican Republic, who entered the United States for permanent residence on January 5, 1968 in possession of an immigrant visa, classified exempt from the labor certification requirement, because she was the child of a lawful permanent resident. The Immigration and Nationality Act defines a "child" as "an unmarried person," section 101(b)(1) of

the Act. The respondent was issued her visa on December 20, 1967 and was married on January 2, 1968, three days before she entered the United States. Inasmuch as she was no longer a "child" within the definition of section 101(b)(1) of the Act, she was required to have a labor certification at the time of her entry. She had none. Therefore, she was excludable.

The respondent contends that the Government is estopped from deporting her for having married prior to her entry, because the consul, at the time he issued her the visa, did not inform her of the immigration consequences of marriage prior to entry, and because the immigrant inspector did not exclude her at the time of entry.

Under the applicable State Department regulations, the consul is required to inform a visa applicant of those consequences, 22 C.F.R. 42.122. Ordinarily, a visa applicant will be required to sign Form FS-548 (Statement of Marriageable Age Applicant), on which he or she acknowledges that the requisite explanation has been given; one

copy of the form is then attached to the immigrant visa. No Form FS-548 was attached to the respondent's visa.

ssuming that the consul failed to provide the respondent of the pertinent information, however, such failure would not give rise to an estoppel against the United States Government. Affirmative misconduct, such as official misinformation, has been held to create an estoppel against the United States Government, Brandt v. Hickel, 427 F.2d 53 (9Cir. 1970), but misinformation is not alleged here, rather, failure to provide certain information. Such failure does not give rise to an estoppel against the Government, INS v. Hibi, 414 U.S. 5, 42 L.W. 3241 (1973); Matter of Polanco, Interim Decision 2241 (BIA 1973).

As to the contention that the act of the admitting officer constitutes litigation of the issue and that the Government is estopped from relitigating the issue, this contention is without merit, see Matter of Khan, Interim Decision 2215 (BIA 1973).

ORDER: The appeal is dismissed.

FURTHER ORDER; Pursuant to the immigration judge's order, the respondent is permitted to depart from the

United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the District Director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

Chairman

PETITION FOR REVIEW

Petitioner Leyda A. Filpo-Genao de Perez, by her attorney, respectfully prays that the Court reviews and sets aside the order of the Board of Immigration Appeals dated May 27, 1975. Exhibit 'A'. No judicial review of such order has been had in any court.

Petitioner's Alien Registration number is A17 563 269.

Dated at New York, N.Y.
July 11, 1975.

Thomas D. Axtell (Ed.)

January 4th 1916